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BY HUGH WILSON. ABBEVILLE, S. C., WEDNESDAY, JANUARY 17, 1894. ESTABLISHED 1844

The State, Respondent,

Singleton A. McIntosh, Appellant.

Points and Authorities of Parker & McGowan, and Benet & Cason, for Appellant.

For the second time, Singleton A. McIntosh was tried for the murder of James N. Newby. The second trial was had before his Honor, Judge Norton, at the June Term, 1893, of the Court of General Sessions for the County of Abbeville.

The plea of the accused was Self-defence.

The jury found a verdict of "Guilty of Manslaughter; Recommended to the mercy of the Court."

The sentence of the Court was, five years imprisonment in the State Penitentiary, at hard labor.

From the judgment of the Court below, McIntosh appeals to the Supreme Court on the grounds set forth in the "Case with Exceptions," pages 33, and 34.

The testimony, we think, fairly shows:

1. That McIntosh and Newby were the best of friends.
2. That McIntosh did not bring on the difficulty—on the contrary, was forbearing and long-suffering and without fault.
3. That Newby was not only insulting, but wantonly violated the laws of hospitality, property and person:

(a) In smashing the dishes on the breakfast table with a heavy dipper. McIntosh kindly remonstrated, "don't do that, Crack." The smashing of dishes is repeated. McIntosh again says, "Stop Crack, don't break my wife's dishes—she says I always play the devil when she leaves home."

(b) Newby then smashes a cup in front of McIntosh and says, "Damn you, I'll smash you in the same way."

(See testimony of Callaham, Harmon and Sheriff Mann).

5. McIntosh quietly gets up from the table, without another word, takes his hat from off the cupboard, and walks into a room opening into the dining room and adjoining the room in which both had slept. Thus "retreating" in his own house.
6. That Newby, instead of continuing his breakfast, gets up from the table, first walks down the table until opposite the door through which McIntosh had gone, then turns and goes in the direction of McIntosh.
7. McIntosh, who was just entering the front hall from the bed-room calls to Newby "to stop and not come any further." Newby continues to advance upon him and McIntosh fires one barrel of his gun (loaded with bird shot) into the door facing "to scare him." Folio 63.
8. That Newby "in place of stopping or giving back, ducked his head, moved forward, and threw his right hand to his right hand breeches pocket." Folio 63.
9. That McIntosh then fired the fatal shot.
10. That McIntosh immediately came out of the house and said "he had killed Mr. Newby and was sorry for it and commenced crying." Folio 10.

Points and Authorities.

We think all the elements of self-defence appear here, and we think the trial Judge erred when he charged generally that a man must retreat and exhaust every "means of escape" before he can make out the plea of self-defence; and especially was the charge misleading in this case, because McIntosh was in his own dwelling.

Exceptions II, IV, VI and VI involve this idea. They are as follows:

Exception II. Because his Honor erred in charging the jury, that in order to avail one's self of the plea of self-defence, it must appear that "at the time the prisoner struck the fatal blow, he was so assaulted that he believed that he had no other probable means of escape from immediate death or from immediate serious bodily harm."

Exception IV. Because his Honor erred in charging the jury as follows: "If you come to the conclusion that he (McIntosh) thought there was any other means of escape, then you ought not to give him the benefit of self-defence."

Exception VI. Because his Honor erred in charging the jury that, the deceased having entered defendant's house upon defendant's invitation, "It was the business of the defendant to have notified him (the deceased) to leave, or else he must make out a plea of self-defence as if had notified him."

Exception VII. Because his Honor erred in charging the jury that, "at the time of the homicide the prisoner must have believed that the deceased was assaulting him in such a manner that he had no other probable means of escape from that assault except by taking the life of the deceased, or by doing what he did to prevent the loss of his own life, or serious bodily harm to himself."

The old rule of law that a man must "retreat to the wall" is, on general principles, obsolete and out of date. The rule was good when men used only dirks and daggers and swords and one was compelled to be within arm's length before a fatal result. But since the introduction of fire-arms, the danger is as great at twenty paces as at two, and the antique wall springs up behind a man at the moment and at the place where he reasonably believes himself in danger of serious bodily harm regardless of the distance.

In *Runyan vs. State*, 57 *Ind.* 80, (26 Amer. Rep. 52), the Court says, "The ancient doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has a much narrower application than formerly. The real question is, did the defendant when assaulted, believe and have reason to believe, that the use of a deadly weapon was necessary to his own safety."

But in no event is a man bound to retreat in his own home. His house is his castle and in it he is lord.

The Circuit Judge seemed to think and was not slow to impress his view upon the jury, that if invited by the owner of a house to enter he was bound (1) to "gently lay his hands upon him and tell him to go," and (2) to use only such force as is necessary to "eject" him. Again: "The law requires that when you have allowed a friend to enter your door, you *must* give him reasonable notice to leave your door before you eject him." Folios 88-89.

Abstractly this may be true, but circumstances alter all cases and under the facts in this case, it was well calculated to mislead the jury. An inflexible rule of this kind would give an infuriated guest every advantage and put the host absolutely in his power.

True, McIntosh had not ordered him to leave. The very fact that he did not is proof positive that he wished to avoid a difficulty, as such an order would have precipitated a fight at the breakfast table. Instead, he quietly leaves without a word. Newby follows him. Newby is ordered to "stop" and advance no further. He still advances. McIntosh fires one shot to "scare him." He still advances with head down and throws right hand into his pocket.

Is it good law or good sense to say, that under these circumstances, McIntosh should have "invited" him to leave? Is it good law or common sense to say that McIntosh should then have "gently laid his hand upon him and told him to go"? Is it not rather a *reductio ad absurdum*? Such a course naturally meant death or serious bodily harm to McIntosh. He did not know what Newby had in his pocket and from his actions McIntosh was certainly justified in believing he had a weapon. His previous conduct coupled with a strong threat, made it desperate folly for McIntosh to have done as the trial Judge charged the jury he ought to have done.

McIntosh had already retreated more than he was bound to, and further retreat, had Newby drawn a pistol, meant a shot in the back and all this in his own dwelling. The laws of hospitality *are* sacred, but there are as high, if not higher, duties devolving upon the guest as upon the host, and to say that the host must endanger his life in quixotic deference to these laws, is neither good law nor good sense and would strip self-defence of its every right.

On general principles a man is not compelled to retreat, in or out of his dwelling, in cases of "felonious assaults."

In a note to Selfridge's famous case, in Horrigan & Thompson's Cases on Self-Defence, the editors say, "where the assault is non-felonious, and in cases of mutual broils and combats where the law supposes both parties in some measure culpable" retreat is necessary. "But if applied to all cases where a person is going his lawful way and is assaulted, without reference to the question whether a felony, or a mere trespass on the person, is manifestly intended, it would require a man to flee before another who murderously assails him, or a traveller to flee before a highway robber, or a woman to flee before her would-be ravisher, before resorting to the extreme measure of defence. It is safe to say that the law puts upon a person no such necessity. The old writers in speaking of *justifiable homicide*—that is homicide committed in the resistance of felonies—make no mention of the duty of retreating." *Foster* 273; 4 *Bl. Com.* 180; 1 *Hale P. C.* 488; 1 *East P. C.* 271. "And it is safe to say, that if an assault is manifestly felonious, the person assailed, being himself innocent, may ordinarily kill the assailant without retreating. Accordingly it is stated by Mr. Bishop, that where an attack is made with murderous intent, the person attacked is under no obligation to flee, but may stand his ground, and if need be, kill his adversary. And this is clearly the law."

1 *Bish. Crim. Law* (5 *Ed.*) § 850.

We think the proof here shows that the attack was murderous—certainly that the defendant had the right to think so; and we think the Judge should have at least charged that McIntosh was not forced to retreat if the attack was such, instead of several times repeating that the accused cannot plead self-defence "if there was any other means of escape."

In *Pond vs. People*, 8 *Mich.* 150, Court says, "If any forcible attempt is made with a felonious intent, against person or property, the person resisting is not bound to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. * * Reasonable apprehension, however, is sufficient here, precisely as in all other cases."

In Cases on Self-Defence, *supra*, p. 32, note, it is said: "If a man who is murderously assailed is obliged in all cases to retreat before killing, there may be no limit to his retreating so long as his emeny shall pursue his murderous intent. He may be obliged to hide away from his adversary continually and carry on his business stealthily by night.

"We repeat our conviction that the law does not thus leave it to the pleasure of a felon to determine whether an innocent man may pursue his just way, or whether he shall be obliged to fly. The rule then, as laid down in some cases, that the right to defend one's self does not arise until the defendant has at least attempted to avoid the necessity of that defence, must not be understood as putting upon an innocent person who is murderously assailed, the necessity of retreating before he can kill his assailant; but must be held to apply to cases where the assalled is himself in some fault, or where the assault is not, in its character, manifestly felonious."

In *Bohannon vs. Commonwealth*, 8 *Bush.* 481, (Ky.) (8 Amer. R. 474), the Court says: "It was misleading to instruct the jury, under the proof in this prosecution, that Bohannon's right of self-defence did not arise until he had "*done everything in his power to avoid the necessity*" of slaying his adversary.

We think, under the facts of the case at bar, Judge Norton's charge did mislead the jury when he said "if you come to the conclusion that the defendant McIntosh thought there was *any other means of escape*, then you ought *not* to give him the benefit of self-defence."

"In all cases where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believed them to be, he is legally, as he is morally, innocent."

1 *Bish. Crim. Law*, § 242.

"Where defendant addressed deceased in a peaceable manner, and the latter replied angrily and insultingly, and approached him with his hand on his pistol pocket as though to draw and fire, *Held*, that defendant was justified in firing first, though it subsequently appeared that deceased had no weapon."

De Arman vs. State, 71 *Ala.* 35.

9 *Amer. & Eng. Ency. of Law.* 598, *note* (6).

"If an assault is made under circumstances which create a just apprehension of imminent danger of death or great bodily harm to another, it is adequate ground for that reasonable fear of immediate danger which will justify the killing of the assailant."

9 *Amer. & Eng. Ency. of L.*, 600.

"The right of self-defence is not impaired by mere preparation for a wrongful act; but such preparation must be accompanied by some demonstration, either verbal or otherwise, indicative of the wrongful purpose."

Fortenberry vs. State, 55 *Miss.* 405.

9 *Amer. & Eng. Ency. of L.*, 603.

Carroll vs. State, 23 *Ala.* 28.

Collins vs. State, 32 *Iowa* 36.

Yonng vs. Commonwealth, 6 *Bush* 312.

Patton vs. People, 18 *Mich.* 314.

But we say that a man, who is himself without fault, is under no circumstances bound to "retreat," or seek means of "escape" from his own house.

At page 33 of Cases on Self-Defense, *supra*, is the following note, "A man being in his habitation is 'at the wall' and 'in his castle,' and is not obliged to retreat under any circumstances."

In *Pond vs. People*, 8 *Mich.* 150, it is said, "A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in other cases, he must not take life if he can otherwise arrest or repel the assailant."

2 *Bish. Crim. Law.*, § 569.

3 *Green. Ev.*, § 117.

Hawk. P. C., Book 1, *Ch.* 28, § 23.

Cases on Self-Defense, *supra*, p. 861, note (1), "Where a person is defending his home, or defending himself or his family, guests or defendants, *in his house*, he is not obliged to *retreat* before he can justify killing, as he ordinarily is in cases of defence in combat. The reason of this rule is, that in law, a man's house is his castle, or as the old books express it, his *tutissimum refugium*; and having retired thus far, the law does not expect him to yield further."

1 *Hale P. C.* 486.

State vs. Patterson, 12 *Amer. L. Reg. N. S.* 653.

Pond vs. People, *supra*.

Carrol vs. State, 23 *Ala.* 28.

In 23 Alabama, *supra*, Court says: "The rule of Common Law is, that a man may repel force by force in defence of his person, habitation or property, against one who manifestly endeavors, by violence or surprise, to commit a felony . . . . , and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger.

"*In other cases*, the law requires the use of every precaution, consistent with safety, even to flight itself, before taking life, unless, indeed the party assailed has the *protection* of his *house* which excuses him from retreating further."

"A person assaulted in his dwelling-house is not bound to retreat."

9 *Amer. & Eng. Ency. of L.*, 604 *and* 606.

Dolan vs. State, 81 *Ala.* 11.

Jones vs. State, 76 *Ala.* 8.

State vs. Harman, 78 *N. C.* 515.

"Where one is attacked by another who manifestly attempts by violence, to take his life or do him great bodily harm, and under such circumstances that no retreat is practicable, he is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is justifiable self-defence."

9 *Amer. & Eng. Ency. of L.*, 605.

Retreat is not required where assault is with deadly weapon.

Thompson vs. State, 9 *Iowa* 188.

Kennedy vs. State, 20 *Iowa* 569.

Retreat not necessary where the assailant has made threats and his demonstrations indicate a design to carry them into execution.

Kennedy vs. State, 7 *Nev.* 374.

In case at bar McIntosh was threatened. Immediately after deceased advanced upon him. He pays no heed to warnings, but still advances, throwing his right hand into his pocket. Under these circumstances McIntosh had the right to believe that he would draw a deadly weapon, and Judge Norton should have charged that if such were the true facts, then he was *not* bound to retreat.

In *Meredith vs. Commonwealth*, 18 *B. Monroe* 49 (Ky.) it is said, "If one is threatened with death, or some great bodily harm, and has reasonable ground to believe that it will be immediately inflicted, unless prevented by an act of self-defence, which is in the power of the person assailed, he has the right to use such defence for his own safety, although it might afterwards appear that there was no real design to inflict the apprehended injury. Therefore, an instruction that the defendant might lawfully kill his assailant "*if he had no safe means of escaping*"; and that he is not excusable "*if he could have safely retreated from the danger and by that means have saved life*," is erroneous, because it leaves out of view or negatives the principle above stated."

(2).

Exception III is a direct charge on the facts and very misleading.

Because his Honor erred in charging the jury as follows: "*I say to you, that if the defendant here did as he says he did, and not having malice, gets up from the table at which the deceased was sitting for the purpose, bona fide, of avoiding a difficulty, and the conduct of the deceased was so provoking as to arouse his blood, to temporarily lose control of his passions, then it would be manslaughter.*"

This charge is in effect—grant all that McIntosh says to be true and he is still guilty of manslaughter—eliminating all possibility of self-defence. When we remember that an intimation, coming from the Judge, goes a long way with the average jury, this strong expression was bound to have its effect.

If it was held by this Court error in Judge Aldrich to say, in *State vs. Norton*, 28 S. C., 579, "I do not see any room here manslaughter," equally is it error in Judge Norton to say in the case at bar, "Then it would be manslaughter."

When Judge Norton, in *State vs. Turner*, instructed the jury that "a verdict of manslaughter might be proper in the case," Mr. Chief Justice Simpson, delivering the opinion of this Court, held he had committed error, and said, "We think his Honor's charge above did not leave the question of self-defence open to the jury." (29 S. C., 41, and 45). In his charge to the McIntosh jury, Judge Norton again, by his suggestion of manslaughter, "did not leave the question of self-defence open to the jury."

(3).

We think the trial Judge was misleading to the jury in his charge as to Sheriff Mann's testimony.

This testimony was entitled to peculiar weight, yet, twice, when the foreman, after the jury had deliberated for nineteen hours, asked if they should give the same consideration or weight to this as to other evidence in the case, the Judge so qualified his answer, as to leave the jury in as much doubt as ever. Folios 90 and 93.

1. The testimony was offered by the State and the Solicitor stated that he stood upon every word of it.
2. The conversation (between the Sheriff and McIntosh) was had at a time and under circumstances which precluded all idea of "manufactured" testimony. It was immediately after the first trial when the defendant was convicted of "murder"; in the lonely limits of his narrow cell; overwhelmed with sorrow and obeying that impulse of the heart which is at times irresistible, he unburdens his troubled soul to the Sheriff. Listen to his first sentence: "Sheriff, it is hard for a man to be sentenced to be hung for killing a man in self-defence." And I beg the Court to remember that on the first trial his plea was not self-defence, but "unsoundness of mind at the time of the homicide," so that nothing at that trial could have suggested his speech.

Under these circumstances—we think when the foreman simply asked if they could give this testimony the "*same consideration*" as any other in the case, the Judge should have announced "certainly" and no more, and not have qualified his answer with long qualifications, as he did both times.

At last, the conclusion of the jury shows that it was a compromise verdict, viz: "Guilty of manslaughter—recommended to mercy," and this after nineteen hours deliberation; and it is safe to say that the intimations, qualifications and evident leaning of his Honor had much to do with it. Folios 90 and 96.

Self-defense—Requisite of the Plea.

Our first ground of appeal alleges error on the part of Judge Norton because he charged the jury that, "In order to make out a case of self-defence, it is necessary for the defendant to prove his innocence by the preponderance of the testimony."

Herein his Honor's charge touches two questions;—

(1) The Requisites in the Plea of Self-defense; and

(2) The burden of proof.

(1) What are the Requisites in the plea of Self-defense?

This Court has laid them down distinctly in *State v. McGreer*, 13 S. C., 466; and in *State v. Beckham*, 24 S. C., 284. According to these cases the requisites are,

First: that the accused must have actually believed that he was in immediate danger of losing his life, or of sustaining great bodily harm.

Second; that the circumstances were such as would, in the opinion of the jury, justify such a belief.

Third; that the accused must have been entirely without fault in bringing about the difficulty.

We submit that if these three requisites are complied with, the plea of self-defense is completely established; and that Judge Norton erred in endeavoring to add a fourth,—which indeed would render useless the three just mentioned—when he told the jury that it was necessary for McIntosh "to prove his innocence."

(2) The Burden of Proof.

In laying down this extraordinary proposition, it is manifest that the Judge was thinking of the burden of proof. And we submit that in this view also he erred.

At no stage in a criminal case is it necessary for the accused to "prove his innocence," no matter what his plea or defense may be.

Judge Norton's proposition entirely destroys and removes the law's presumption that the accused is innocent until proved guilty. This presumption is in the "A. B. C." of the criminal law.

"The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption." Roscoe's Cr. Ev., 17.

His Honor would seem to have confused the "burden of proof" with the "weight of evidence;" as the following authorities will show.

"Every man is presumed to be innocent until the contrary is proved, and if there be any reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt. This is a presumption of law (*presumtio juris*), which the law makes arbitrarily in all cases, but which, unlike the *presumptiones juris et de jure*, may be rebutted by evidence. Between civil and criminal cases there is in this respect an important distinction: in the former, the jury weigh the testimony, and, after striking a fair balance, decide accordingly; but in criminal cases the testimony must be such as to satisfy the jury beyond a rational doubt that the prisoner is guilty of the charge alleged against him in the indictment, or it is their duty to acquit.

. . . . . .

"We frequently hear that after a *prima facie* case on one side the burden of proof is shifted to the other side; and this shifting of the burden of proof, which no doubt takes place after a *prima facie* case, is confounded with the question of the degree of proof necessary to a verdict. The questions are entirely separate. A defendant may often have the burden of proof imposed on him. But when the case goes to the jury, there is no essential element in his guilt which must not appear to be proved beyond a reasonable doubt. . . . . .

"The rule of the *burden of proof* cannot be made to depend upon the *order of proof*, or upon the particular mode in which the evidence in the case is introduced. It can make no difference in this respect whether the evidence comes from one party or the other."

Wharton on Homicide, (7th ed.) Sec's. 646,—7,—8.

"No one doubts that if the defendant admits his guilt, either absolutely or for the purpose of the trial, and sets up by plea such matter of defence as a former conviction or a pardon, or if an issue to the jury is tried on his plea of abatement, the burden of proof is with him. On the other hand, where the issue is, whether or not the defendant committed an offense, the government by its indictment or information averring that he did, and he by his plea of not guilty denying it, every principle of reason and justice requires that the proof of guilt, including every element in it, shall come from the party making the charge. . . .

"The government, taking thus the burden of proof, is required in the first instance to make out only a *prima facie* case against the defendant. . . . . .

"When the *prima facie* case is established, the defendant is liable to be convicted, unless he meets it by something in rebuttal. And many judges, in language not nicely accurate, speak of this necessity of rebuttal by the defendant as his having the burden of proof cast upon him. It is more exact, and it expresses the better doctrine, to say, that the *prima facie* showing does not change the burden of proof, which remains with the prosecuting power to the end; the jury, to be authorized to convict, being required to take into the account all the evidence on both sides, including the presumptions, and to be affirmatively satisfied from it, with the certainty demanded by law, of the defendant's guilt.

"Whatever be the doctrine in civil cases, it would be a wide departure from the humanity of the criminal law to compel a jury, by a technical rule, to convict one of whose guilt upon the whole evidence they had reasonable doubt.

"And it would reverse the presumption of innocence, as well in one set of circumstances as another, to hold a defendant guilty, unless, taking the burden on himself, he could affirmatively establish his innocence.

"Evidence is not properly to be considered in detached parts, but as a whole. One, to be guilty of a crime, must have committed the whole of it. The government, to be justified in punishing him, must prove the whole. In reason, therefore, this whole and indivisible thing, the burden of proof, must be borne by the government throughout the entire trial."

1 Bish. Cr, Proc., (3rd. ed.), Sec's. 1048,—51.

"In criminal cases the burden of proof never shifts; before a conviction can be had the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendent is guilty, in the manner and form as charged in the indictment."

2 Amer. and Eng. Encyc. of Law, 657.

In note 1 on same page is the following: "In every criminal case the burden is, throughout, upon the prosecution. Whatever course the defense deem it prudent to take, in order to explain suspicious facts or remove doubts, yet it is incumbent on the prosecution to show, under all the circumstances, as a part of their own case, unless admitted or shown by defense, that there is no innocent theory possible which will, without violation of reason, accord with the facts."

People v. Millard, 53 Mich., 63,

"In criminal cases the burden of proof is on the prosecutor to show that the accused is guilty of the offense charged. But when the accused relies upon any substantive, distinct, separate, and independent matter as a defense, which is outside of, and does not necessarily constitute a part of, an act or transaction with which he is charged, (such as the defense of insanity, etc.), then it devolves upon him to establish such special and foreign matter by a preponderance of evidence. It is not error to instruct in such cases that the burden of proving such defenses devolves upon the accused."

4 Amer. and Eng. Encyc. of Law, 844—5.

In the notes on page 845 we find the following; "The claim of self-defense is merely a denial of the malice which the prosecution is bound to establish beyond a reasonable doubt. Accordingly, some cases hold that the defendant is entitled to an acquittal if, upon the evidence, it is doubtful whether the homicide or assault was malicious or was in self-defense." (Cases cited.)

"While others hold that the defendent must make out a case of self-defense, by a preponderance of proof." (Citing two Ohio cases.)

Note,—that these Ohio cases do not hold, as did Judge Norton, that the defendant must "prove his innocence by a preponderance of the testimony," but, more mildly, "must make out a case of self-defense."

On same page 845, in the notes is this authority: "If the defendant relies upon no separate, distinct or independent facts, but confines his defence to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the government throughout the case to prove the act a criminal one."

People v. Rodrigo, 69 Cal.; 601.

And also on same page thus: "Where the defence is interposed, the burden of proof is on the State to negative it."

People v. Coughlin, (Mich. 9 April. 1887), 9 West. Rep., 129.

In *Staie v. Welsh*, S. C., 7, a self-defense case, Judge Wallace charged the jury that "the defendant, when he undertakes to make out his defense, accomplishes his purpose when he satisfies the jury of the truth of the allegations in his behalf by the preponderance of the testimony; the burden is always on the prose-

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